United States Department of Labor
Employees' Compensation Appeals Board

Z.P., Appellant	)	
and	)	**Docket No. 08-482**
	)	**Issued: August 26, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Glendale, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 28, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 11, 2007 with respect to compensation commencing May 10, 2000. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined appellant's pay rate for compensation purposes and entitlement to compensation during the period May 10, 2000 to January 16, 2003.

FACTUAL HISTORY

On August 8, 2000 appellant, than a 38-year-old part-time flexible (PTF) clerk, filed a claim for compensation indicating that on April 3, 2000 she was lifting a container of mail and

felt back pain.[1] The Office accepted the claim for a subluxation. By decision dated July 19, 2001, it denied wage-loss compensation for the period May 30 to June 7, 2001. An Office hearing representative affirmed the decision on May 21, 2002.

Appellant continued to work and filed claims for intermittent periods of disability. In a letter dated April 26, 2002, an employing establishment human resources specialist stated that appellant was a PTF who was scheduled as needed. The specialist stated that appellant's average pay was 6.98 hours per day.

By decision dated May 29, 2003, the Office denied merit review of the May 21, 2002 decision. The Board affirmed the May 29, 2003 Office decision in a decision dated November 22, 2004.[2]

The record contains "OWCP Time Loss Logging Sheet" for the period April 2000 to May 2002. The sheets indicated appellant worked varying hours, often more than eight hours per day, and was paid overtime for hours in excess of eight per day.

In a letter dated August 18, 2005, the Office found appellant was entitled to 71.85 hours of compensation during the period April 4, 2000 to December 30, 2003. The pay rate for compensation purposes was $648.79 per week. By letter dated February 6, 2006, the Office stated that appellant was also entitled to compensation of 6.98 hours from December 10 to 13, 2001, and additional hours on March 5 and June 18, 2002. With respect to work hours, a memorandum of telephone call reported that, according to the employing establishment, PTF's "are only allowed to work a maximum of 6.98 hours per day."

By decision dated February 16, 2007, the Office found that appellant's pay rate for the April 3, 2000 injury was $648.79, based on an hourly rate of $18.59 at 6.98 hours per day, or 34.90 hours per week. For the period May 10, 2000 to January 16, 2003, it reported the number of hours actually worked per week. For weeks that appellant worked more than 34.90 hours, she was not entitled to compensation. Based on this analysis, the Office found appellant was entitled to an additional 64.77 hours of compensation.

Appellant requested a hearing before an Office hearing representative, which was held on July 19, 2007. She indicated she worked six days a week from 2000 to 2003. In an August 22, 2007 memorandum, the employing establishment human resources specialist stated that appellant did work 6 days for 10 weeks in 1999 and 2000, but asserted the "sixth day would be considered overtime."

In a decision dated September 11, 2007, the hearing representative affirmed the February 16, 2007 decision.

[1] Appellant filed a notice of recurrence of disability (Form CA-2a) and reported the date of the original injury as January 26, 1999. The record indicates she had a prior claim for injury on this date. Since appellant was alleging a new employment incident, the case was developed as a claim for a new injury.

[2] Docket No. 04-1385 (issued November 22, 2004).

LEGAL PRECEDENT

Section 8114(d) of the Federal Employees' Compensation Act provides:

"Average annual earnings are determined as follows:

"(1) If the employee worked in the employment in which he was employed at the time of his injury during substantially the whole year immediately preceding the injury and the employment was in a position for which an annual rate of pay--

> (A) was fixed, the average annual earnings are the annual rate of pay; or
>
> (B) was not fixed, the average annual earnings are the product obtained by multiplying his daily wage for particular employment, or the average thereof if the daily wage has fluctuated, by 300 if he was employed on the basis of a 6-day workweek, 280 if employed on the basis of a 5½-day week, and 260 if employed on the basis of a 5-day week."

ANALYSIS

The Office has accepted that appellant is entitled to compensation for wage loss during the period May 10, 2000 to January 16, 2003. The issue is whether appellant received the proper amount of compensation. The term "disability" as used under the Act means the incapacity, because of injury in employment, to earn the wages which the employee was receiving at the time of injury.[3] To determine the wages appellant was earning at the time of the injury, the Office calculates the pay rate in accord with 5 U.S.C. § 8114.[4] According to it, the pay rate for compensation purposes was $648.79 per week, based on 34.90 hours per week at $18.59 per hour. The Office did not refer to 5 U.S.C. § 8114.

Based on a review of the relevant evidence of record, the Board is unable to determine whether 5 U.S.C. § 8114 has properly been applied in this case. The date of injury in this case was April 3, 2000, and therefore the relevant period is the year prior to the date of injury. It appears that at the time of injury appellant had worked in the employing establishment for the year preceding the injury, with no fixed annual earnings. According to 5 U.S.C. § 8114(d)(2), the average annual earnings are her average daily wage multiplied by the appropriate number for the length of the workweek.

Although the record documents appellant's work hours from April 2000 forward, there is no probative evidence documenting her actual work hours from April 1999 to April 2000. The employing establishment stated that 6.98 hours represented a "maximum," but the available evidence appellant indicated that she regularly worked more than 6.98 hours. In the August 22, 2007 memorandum, the employing establishment appeared to assert that additional hours would

[3] *Donald Johnson*, 44 ECAB 540, 548 (1993); 20 C.F.R. § 10.5(17).

[4] 20 C.F.R. § 10.5(s) states that "pay rate for compensation purposes" is the pay, as determined under 5 U.S.C. § 8114, at the time of injury, the time disability begins or the time compensable disability recurs if the recurrence begins more than six months after resumption of regular full-time employment, whichever is greater.

be considered overtime. While overtime pay is not included in pay rate under 5 U.S.C. § 8114(e),[5] it is not clear from the record what hours were considered overtime. For example, the time loss logging sheets for 2000 and forward referred to overtime only for hours above eight per day.

The case must be remanded to the Office to secure the necessary evidence to apply 5 U.S.C. § 8114. The evidence should document the specific hours and days worked from April 1999 to April 2000, and clearly explain how overtime pay was calculated so that a proper determination as to pay rate pursuant to the Act can be made. Once the pay rate at the time of injury is properly determined, the Office can determine the extent of disability during the claimed periods and properly pay compensation for wage loss. After such further development as the Office deems necessary, it should issue an appropriate decision.

CONCLUSION

The case is remanded to the Office for additional development of the evidence and a proper decision under 5 U.S.C. § 8114.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 11 and February 16, 2007 are set aside and the case remanded for further action consistent with this decision of the Board.

Issued: August 26, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[5] 5 U.S.C. § 8114(e) states that account is not taken of the value of overtime pay in determining pay rate. 5 U.S.C. § 8114(a) provides that overtime pay "means pay for hours of service in excess of a statutory or other basic workweek or other basic unit of worktime, as observed by the employing establishment."